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MAT ABU MAN

v.

MEDICAL SUPERINTENDENT, GENERAL HOSPITAL TAIPING & ORS.

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SUPREME COURT, KUALA LUMPUR
 HASHIM YEOP SANI ACTING CJ (MALAYA)
 MOHD. YUSOFF MOHAMED SCJ
 AJAIB SINGH J
 [CIVIL APPEAL NO. 102 OF 1987]
 12 DECEMBER 1988

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TORT: *Negligence - Road accident - Injured person hospitalised - Contribution and indemnity claimed against hospital - Period of limitation commenced from the date the defendant was held liable - Third party proceedings not statute-barred.*

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This was an appeal by the appellant/defendant against the decision of the High Court which held that the appellant's claim against the first respondent/third party which was a public authority was statute-barred under s. 2(a), Public Authorities Protection Act 1948. The appellant had claimed contribution and indemnity by the respondents under s. 10(1)(c), Civil Law Act 1956 where he alleged that the first respondent was a joint tortfeasor. The administrators of the estate of the deceased who was injured in a road accident claimed damages against the appellant for negligence. The deceased was hospitalised and died of septicaemia and gasgangrene, secondary to multiple fractures.

*e***Held:**

[1] The period of limitation which was 36 months under s. 2, Public Authorities Act 1948 against a public authority commenced from the date the defendant is held liable. Third party proceedings for contribution was separate from the proceedings by the second respondents/plaintiffs against the appellant.

[Appeal allowed with costs.]

*f***Cases referred to:**

Merlihan v. A.C. Pope, Ltd. and J.W. Hibbert [1946] KB 166
Horden Richmond, Ltd. v. Duncan [1947] 1 All ER 427
George Wimpey & Co. Ltd. v. British Overseas Airways Corporation [1955] AC 169
Brambles Constructions Pty. Ltd. v. Helmers [1965-66] 114 CLR 213
Freeborn v. Leeming [1926] 1 KB 160
Carey v. Bermondsey Borough Council [1903] 67 JP 447

*g***Legislation referred to:**

Civil Law Act 1956, ss. 10(1), (1)(c)
 Law Reform (Married Women & Tortfeasors) Act 1935 [UK], s. 6(1)(c)
 Law Reform (Miscellaneous Provisions) Act 1946 (NSW) [Aust], s. 5(1)(c)
 Public Authorities Protection Act 1948, s. 2(a)
 Rules of the High Court 1980, O. 16, O. 73 r. 8

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For the appellant/plaintiff - V. Rajendran; M/s. R.K. Nathan & Co.
For the first respondent/first defendant - Tee Geok Hock; FC

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JUDGMENT

Hashim Yeop Sani Acting CJ (Malaya):

There was a road accident on 14 July 1981 involving a motorcycle and a motorcar. The motorcyclist and his pillion rider sustained injuries. On 16 July 1981 the motor cyclist died at the Taiping General Hospital of septicaemia and gasgangrene, secondary to multiple fractures.

On 19 July 1983 the administrator of the estate of the motor cyclist together with the pillion rider took out a writ against the defendant claiming damages on the grounds of negligence of the defendant in driving his motor vehicle. The defendant then filed his statement of defence and counter claim.

On 4 January 1985 pursuant to leave of the Court given on 22 January 1984 under O. 73 r. 8 of the Rules of the High Court 1980 the defendant took out third party notices against the Superintendent, District Hospital, Taiping and the Government of Malaysia as third parties. The claims of the defendant against the third parties were for contribution and/or indemnity under s. 10(1) of the Civil Law Act 1956.

The third parties denied that the defendant is entitled to contribution or be indemnified by them. Pursuant to the leave of the Court on 6 March 1981 the third parties amended their defence by pleading that the defendant's action against the third parties was statute barred by reason of s. 2(a) of the Public Authorities Protection Act 1948.

It is convenient at this juncture to set out the relevant statutory provisions.

Section 2(a) of the Public Authorities Protection Act 1948 provides for the protection of persons acting in the execution of statutory or public duty against any suit, action, prosecution or proceeding and such suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

Section 10(1)(c) of the Civil Law Act 1956 provides that where damage is suffered by any person as a result of a tort:

any tort-feasor **liable in respect of that damage** may recover contribution from any other tort-feasor who is, or **would if sued have been, liable** in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

When the case came up for hearing before the learned Judge in the High Court Ipoh on 3 October 1987 the Judge acceded to the request of Counsel for the third parties that the defence of limitation raised by them against the defendant be tried as a preliminary point of law. The Judge heard submissions and ruled that the defence of limitation succeeded and dismissed the defendant's claim against the third parties. Hence the appeal.

At the outset it may be observed that s. 10(1)(c) of the Civil Law Act is not an easy statutory provision to construe. The provision is more or less a direct copy of s. 6 (1)(c) of the Law Reform (Married Woman and Tortfeasors) Act 1935 of the United Kingdom. In *Merlihan v. A.C. Pope, Ltd. & J.W. Hibbert* [1946] KB 166 the Court examined the provisions of the 1935 Act. It was argued in that case that in so far as concerned the defendants as against the

- a* third party, the date of the accident, 15 March 1943, was irrelevant and that the date of the cause of action as between them must be taken to have been 14 June 1945 because that was the first date on which they became liable by the finding of the Court. Thus it was argued that in a third party proceeding for contribution the Limitation Act has no application. But Birkett J held that the third party was protected by the Limitation Act 1939. He was also of the opinion that when s. 6(1)(c) of the 1935 Act was drafted that particular problem was not foreseen by the draftsman.
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In *Hordern Richmond, Ltd. v. Duncan* [1947] 1 All ER 427 Cassels J however took the view that the Limitation Act only starts to run in favour of a third party when the defendant in the proceeding has been found to be liable for damages. The learned Judge also distinguished the proceeding by the defendant against third parties for contribution.

- c* In *George Wimpey & Co. Ltd. v. British Overseas Airways Corporation* [1955] AC 169 the respondent was a public authority whose employee who was injured in an accident had brought an action against the appellant company more than twelve months after the accident, claiming damages for negligence. The appellant company served a third party notice on the public authority claiming contribution under s. 6(1)(c) of the 1935 Act. Later the public authority was joined as second defendant and pleaded as a defence to both the claim in the action and the third party proceedings that it was protected by the Limitation Act 1939 in that the proceedings had not been commenced before the expiration of one year from the date on which the cause of action accrued, that is, the date of the tort. The trial Judge gave judgment in favour of the injured employee against the appellant company but held that the action against the public authority failed because it was statute barred.
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- e* The facts of that case are not altogether similar to the facts of the present case before us but that case is useful to find the proper interpretation of s. 6(1)(c) of the 1935 Act which is the origin of s. 10(1)(c) of our Civil Law Act. It was made clear by Lord Reid in that case that before 1935 if judgment was recovered against one joint tortfeasor that judgment was a bar to any action against another joint tortfeasor even although no sum has been or could be recovered under that judgment. This provision, that is, s. 6(1)(c) of the 1935 Act removed that bar.
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- g* Another case useful to find the proper interpretation of s. 10(1)(c) of our Act is the Australian High Court decision in *Brambles Constructions Pty. Ltd. v. Helmers* [1965-66] 114 CLR 213. The High Court dealt with s. 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act 1946 of the State of New South Wales which is the corresponding provision and couched in identical language. In that case during the course of the proceedings for negligence the respondent served a third party notice on the appellant claiming that the appellant by its tortious conduct had caused or contributed to the damage in respect of which the respondent was being sued and claimed contribution pursuant to s. 5(1)(c) of the New South Wales Act. But at the date when the respondent gave his third party notice to the appellant more than six years had elapsed since the date of the occurrence of the damage and the appellant pleaded in that action the appropriate Statute of Limitations. Barwick CJ said at p. 219:

- h* The effect of s. 5(1)(c), in my opinion, is that a tort-feasor who has come under an enforceable obligation to pay money for the damage caused by his tortious act may successfully recover contribution from another tort-feasor who has also come under an obligation to pay money in respect of the same damage and he may also recover contribution from any other tort-feasor who, not having been sued by the injured party, had he been sued, would have been found to have caused or contributed to the same damage by a tortious act.
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Thus upon its proper construction the provision in the New South Wales Act does not make available to the defendant tortfeasor in an action for contribution any time limitation which would have been available to him in an action of tort brought against him by the injured party. It was held that the provision should be read “without the importation of any temporal element” or as if the words “at any time” were present after the words “if sued”.

The respondents relied also on *Freeborn v. Leeming* [1926] 1 KB 160. Apart from the fact that it is an old case the facts are actually not applicable here. There the plaintiff, being injured in an accident, was taken to a workhouse infirmary and placed under the care of the defendant, the medical officer. The defendant negligently failed to diagnose the nature of the plaintiff’s injury and made no attempt to give him the treatment which if given at the time would have effectually cured him. On 15 October 1923, the plaintiff left the infirmary and from that time ceased to be under the defendant’s care. He consulted another doctor, who discovered that his hip was dislocated, but as it was then too late to apply the necessary remedy, the plaintiff’s injury was permanent. On 25 April 1924, more than six months after he had ceased to be under the defendant’s care, he brought his action claiming damages for negligence. It was held that on the authority of *Carey v. Bermondsey Borough Council* [1903] 67 JP 447 the action was barred by s. 1 of the Public Authorities Protection Act 1893, not having been commenced “within six months next after the act, neglect, or default complained of.”

In our opinion the answer to the appeal before us lies in ascertaining the true object of s. 10(1)(c) of our Civil Law Act. Like its English predecessor the provision gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage.

We also do not think that a proceeding under O. 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant. Third party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is held liable.

Therefore in the case of the third parties before us s. 2 of the Public Authorities Protection Act 1948 should not assist them although the third party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 July 1981) or the date of the death of the motorcyclist (16 July 1981).

We accordingly allowed the appeal with costs to be taxed here and below. Deposit to be returned to the appellant.

Also found at [1989] 1 CLJ 137

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